Supreme Court of the United States

October Term, 1962

No. 150

HAROLD J. SILVER, d b a
MUNICIPAL SECURITIES COMPANY,
and MUNICIPAL SECURITIES COMPANY, INC.,
Petitioners,

v.

NEW YORK STOCK EXCHANGE,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

A. Donald MacKinnon
1 Chase Manhattan Plaza
New York 5, New York
Attorney for Respondent

Samuel L. Rosenberry
Edward J. Reilly, Jr.
Squire N. Bozorth
Of Counsel

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BRIEF FOR RESPONDENT

Questions Presented

The principal issue is whether the responsibilities of the New York Stock Exchange (the Exchange) under the Securities Exchange Act of 1934 require immunity from the Sherman Act. In determining that issue, the following questions are presented:

1. Was the action of the Exchange in directing the discontinuance of private wires of its members with non-members taken pursuant to its responsibilities under the Securities Exchange Act?

2. Is the Exchange immune from the Sherman Act when acting pursuant to its responsibilities under the Securities Exchange Act?

3. Does immunity of the Exchange from the Sherman Act depend upon the reasonableness of its action?

Only if the Court concludes that the Exchange is not immune from the Sherman Act will it be necessary to consider whether the action of the Exchange was a *per se* violation. The resolution of that issue presents the following question:

4. Should action taken by the Exchange pursuant to its responsibilities under the Securities Exchange Act be judged without a full inquiry afforded by a trial?

STATUTES INVOLVED

The statutory provisions involved, in addition to those cited in the brief for the United States, are Sections 23(a) and 25(a) of the Securities Exchange Act of 1934. They are set forth at pages 36-37 of the appendix.

STATEMENT

Introduction

The Exchange is an unincorporated association registered as a national securities exchange with the Securities and Exchange Commission (the Commission) (R. 94). It provides a quality market for its members to trade in securities listed with the Exchange (*ibid.*). The prices at which listed securities are traded are determined by auction on the floor of the Exchange (R. 205).

Among the facilities of the Exchange is the continuous quotations service which furnishes current prices of listed securities (R. 185). Quotations are made available to non-members either by the stock ticker service carried over the facilities of the Western Union Telegraph Company or by private wires maintained by a non-member with one or more member firms (R. 185-86). Frequently, as in this case, a non-member will avail itself of both means of obtaining continuous quotations of listed securities (R. 39-40, 47-50).

Private wires with member firms also afford a non-member with a facility for transmitting orders to buy or

sell listed securities (R. 186) and, in many cases, may be used to effect transactions in unlisted securities (R. 206).

Many member firms also transact business as brokers and dealers in unlisted securities. The prices for unlisted securities are generally established by offers to buy and sell communicated between traders in the offices of brokers and dealers (R. 205-06).

The Nature of the Action

Municipal Securities Company (Municipal) was a sole proprietorship owned by Harold J. Silver (R. 17) who died on October 2, 1961. By order dated December 4, 1961, the executrix of Silver's estate was substituted as party plaintiff (R. 251). Municipal commenced business in 1955 and confined its activities primarily to transactions in municipal bonds (R. 2, 17). Municipal Securities Company, Inc. (Municipal, Inc.), a Texas corporation organized by Silver in 1958, was engaged in the business of purchasing and selling corporate stocks and bonds, both listed and unlisted (R. 3, 18, 24).

On April 6, 1959, Municipal and Municipal, Inc. commenced this action against the Exchange for treble damages of $3,000,000, attorney's fees, costs and an injunction (R. 11-12, 35). The complaint sets forth three causes of action (R. 1-12). Only the first is here involved. It charges that in 1956 Municipal had private wires installed between its office and three member firms, and that such private wires were necessary for transacting business in unlisted securities (R. 2-3). It then alleges that Municipal, Inc. also arranged for private wires with certain member firms in order that its customers "could be apprised and informed as to the latest quotations of securities listed on the [Exchange] and by means of which [Municipal, Inc.] and its customers could purchase and sell securities listed on [the Exchange] on which quotations had been so obtained" (R. 3). It also alleges that Municipal, Inc. agreed with such member firms that it "would * * * transact business interstate with each of said member firms relative to the purchase and sale of securities listed on the [Exchange]" (R. 3-4).

Finally, it alleges that after the private wires were installed they were withdrawn pursuant to a conspiracy between the Exchange and the member firms, without just cause, and in violation of the Sherman Act (R. 7).

The Facts

In September, 1956, private wires were installed between Municipal and two member firms, one non-member firm and three banks (R. 22-23). In May, 1958, an additional private wire was installed between Municipal and a non-member which later became a member of the Exchange (*ibid.*). The Exchange's approval of Municipal's private wires with member firms was neither requested nor granted (R. 42-43).

In June, 1958, Municipal, Inc. made written application to the Exchange for approval of private wires with nine member firms, eight of which also requested the Exchange's permission to install such private wires (R. 24-25, 39-40, 47-50, 56). In the application Municipal, Inc. represented that it desired the private wires "by means of which [Municipal, Inc.] may obtain continuous quotations of the New York Stock Exchange" (R. 47-48) and agreed that the private wires and the furnishing of said quotations "shall be discontinued whenever [the Exchange] shall withdraw approval thereof" (R. 49).

Upon receipt of the application and other information required to be furnished by Municipal, Inc. concerning it and its officers (R. 51-53), the Exchange gave temporary approval, and the private wires between Municipal, Inc. and the offices of the member firms were installed (R. 25, 40, 96). Thereafter, the Exchange granted temporary approval of a telemeter connection between Municipal, Inc. and the office of another member firm (R. 27). Municipal, Inc. also had private wires with five non-member firms, one of which later became a member of the Exchange (R. 40).

In accordance with its usual practice, the Exchange had an investigation made of Municipal, Inc. and its officers by independent investigating agencies which it had used for many years and found to be well qualified and reliable (R. 97). The investigating agencies submitted reports

which disclosed, among other things, that the Defense Department had suspended the security clearance of the Silvers and of a corporation of which they had been officers, directors and substantial stockholders, and that their efforts to have the suspension vacated were unsuccessful (R. 97-98). The reports also disclosed that the Silvers had breached an agreement relating to the acquisition of certain shares of stock, and there were further disclosures of a derogatory nature bearing on the character and integrity of the Silvers (R. 97).

After carefully evaluating the reports, the Exchange decided to withdraw its temporary approval (R. 98). In February, 1959, without notifying Silver and in accordance with the conditions agreed to in the application, the Exchange directed the member firms to discontinue the private wires with Municipal, Inc. (*ibid.*). They did so (R. 69).

Shortly thereafter, Silver requested the Exchange to inform him of the reasons for its decision (R. 67, 71-72). The Exchange advised him that the decision was based upon a very careful and very thorough investigation and declined to disclose its reasons (R. 67, 73, 74). Although Silver then told the Exchange "that his reputation has always been of the best" (R. 67), his security clearance had been suspended on the grounds that he and Mrs. Silver had "intentionally and without authorization disclosed classified security information," that they had "willfully disregarded security regulations," that their "behavior, activities and associations tend to show that [they] are not reliable and trustworthy," and that they had "deliberately falsified facts and omitted to reveal certain material facts * * * to official representatives of the U. S. Navy and U. S. Air Force" (R. 97-98).

In March, 1959, at the suggestion of the Exchange (R. 67), Silver arranged to have several banks and member firms advise the Exchange that their dealings with plaintiffs had been satisfactory (R. 211). The Exchange caused a further investigation to be made and again reviewed its decision (R. 194). Three additional reports were obtained which confirmed the derogatory information the Exchange had previously received (*ibid.*).

During discovery proceedings the derogatory material was shown to Judge Bicks who ruled that it need not be disclosed to plaintiffs unless plaintiffs released the Exchange and its investigating agencies from any claims for defamation (R. 99). The Exchange's refusal to submit this material to Judge Bryan on the motion for summary judgment was based on the statement of plaintiffs' counsel in open court that an action would be commenced against the parties who furnished the information (R. 126).

The Decisions Below

The substance of the District Court's decision, so far as here material, is that the discontinuance by the member firms of the private wires pursuant to the Exchange's instructions was a concerted refusal to deal and illegal *per se* under Section 1 of the Sherman Act (R. 225-26). The District Court also held that the rule of reason did not apply and, even if it did, the Exchange would not be exonerated because it "acted arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (R. 233). The basis of the District Court's conclusion that the Securities Exchange Act does not afford an exemption from the anti-trust laws is that the Exchange "is not entitled to regulate or control conduct of its members which does not concern the listed securities business which the Exchange carries on in pursuance of the only purpose for which it was established" (R. 223).

The Court of Appeals reversed (Judge Waterman dissenting) and stated there "is no justification in the Securities Exchange Act for drawing a distinction between the control which the Exchange is called upon to exercise over its members when they are dealing with listed securities and when they are dealing with other securities" (R. 264). In holding that the Exchange was immune from the Sherman Act, the majority concluded that the policy of the Securities and Exchange Act requires that the Exchange exercise fully its "disciplinary powers over members of the Exchange with respect to their transactions in over-the-

counter securities" (R. 266). They also stated that if immunity were dependent upon the reasonableness of a particular decision, the Exchange would understandably be reluctant to fulfill its statutory obligations, and held: "In the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation" (R. 267).

In remanding the case, the Court of Appeals pointed out that its holding "does not mean that if the action of the Exchange was arbitrary or unreasonable [plaintiffs] are without a remedy" as "judicial review is a necessary concomitant" of the exercise of power which is required of the Exchange by the Securities Exchange Act (*ibid.*).

Judge Waterman expressed his agreement with the decision of the District Court and stated that the Commission's "expertise does not involve matters of antitrust law, and it does not appear that Congress intended that the Commission was to be an overseer of the antitrust laws" (R. 271).

SUMMARY OF ARGUMENT

I

The Securities Exchange Act imposes upon the Exchange the responsibility of regulating its members' conduct in securities transactions. The Act contemplates that such regulation will be effected through enforcement of the Exchange's rules. The rules and all amendments thereto were required to be filed with the Commission and were found by the Commission to be just and adequate to insure fair dealing and to protect investors.

The rules filed with the Commission included those authorizing the discontinuance by the Exchange of private wires between its members and non-members. The criteria applied in enforcing such rules are the integrity and reliability of the non-member. Plaintiffs did not, in the Exchange's judgment, meet those criteria. The private wires were discontinued to assure a high standard of ethics and

promote conduct of members consistent with just and equitable principles of trade.

That plaintiffs were non-members engaged primarily in transactions in unlisted securities in no way diminishes the Exchange's statutory responsibilities. The United States acknowledges that "an exchange's regulatory authority and duty are not limited to transactions on the exchange, but also extend to members' transactions and relationships with non-members who operate in the over-the-counter market" (Br. 43).

II

In carrying out its responsibilities under the Securities Exchange Act, the Exchange should not be subjected to the civil and criminal penalties of the antitrust laws. If faced with the threat of such penalties, it would be severely handicapped in the performance of its duties. The Exchange could not be expected to make an objective appraisal of a situation that may require disciplinary action if exposed to treble damages, fines and imprisonment. Its responsibilities are comparable to those of a government agency and it should be accorded a corresponding immunity.

A further ground for immunity is the clear repugnancy between the Sherman and Securities Exchange Acts. The mandate of the Sherman Act is that each business entity make its own decisions as to the persons with whom it will deal. The Securities Exchange Act requires that the Exchange make those decisions for its members when necessary to promote conduct consistent with just and equitable principles of trade. The Exchange should not be held to have violated one federal statute for conduct required by another.

The Exchange's decision is, however, subject to review by the Commission which has the sole responsibility for supervision of the Exchange's enforcement of its rules. The Commission is authorized by statute to require the Ex-

change to make changes in its rules and practices and such changes include the manner of enforcing rules.

III

Immunity from the antitrust laws should not be conditioned upon the reasonableness of the Exchange's action. A decision made in good faith to carry out the legislative objectives should not be subjected to judicial scrutiny to ascertain whether, with the benefit of hindsight, it was unreasonable and, as a consequence, in violation of the antitrust laws.

The Exchange could not predict with sufficient certainty whether a court would agree it had acted reasonably in all cases. It would, in effect, be required to act at its peril and could not continue to meet as effectively its statutory obligations.

IV

Even if not immune from the antitrust laws, whether the Exchange violated such laws should be determined only after a full inquiry afforded by a trial. Merely labeling its conduct as a boycott is not sufficient to bring it within the absolute proscription of the *per se* rule. To do so would be to deny the Exchange the right to exercise any regulatory power over its members.

The Exchange's action differed substantially from the usual commercial boycott designed to eliminate competition or promote predatory activities. The Exchange should be afforded an opportunity to establish the characteristics peculiar to securities trading, the many problems confronted in meeting its statutory obligations, the uniform application of its standards, the importance of supervising its members with respect to their transactions in both listed and unlisted securities, and the necessity of discontinuing private wires to promote conduct consistent with just and equitable principles of trade. This could be done only at a trial.

ARGUMENT

I

The Exchange acted pursuant to its responsibilities under the Securities Exchange Act in directing the discontinuance of private wires of its members.

A. The Legislative Objectives

The objectives of the Securities Exchange Act are apparent from Section 2 which provides, in part, that

> "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto * * * and to impose requirements necessary to make such regulation and control reasonably complete and effective * * *."

To accomplish those objectives, Congress could have entrusted the "regulation and control" entirely to the Commission. It decided, however, that the exchanges should have not only the authority but a concomitant responsibility to control their members' conduct in all their securities transactions. This responsibility is not to be shared by the exchanges with anyone. It is only when an exchange fails to meet its responsibilities that the Commission is authorized to act in its place.

The report of the Dickinson Committee which formulated the plan for the regulation of securities transactions stated that the governmental agency to be created

> "must be * * * so constituted as to place responsibility to the fullest extent possible on the private bodies now handling the work of security exchanges. * * * It seems distinctly better, in the opinion of your committee, to stimulate the exchange to further disciplinary activity by holding it to a high degree of accountability for the conduct of its members." Report to Secretary of Com-

MERCE OF COMMITTEE ON STOCK EXCHANGE REGULATION, SENATE COMMITTEE PRINT, 73d Cong., 2d Sess. 7, 8 (1934).

The Senate Report on the bill which became the Securities Exchange Act expressed the same view:

> "Thus the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so." S. REP. NO. 792, 73d Cong., 2d Sess. 13 (1934).

The House Committee Report stated:

> "Although a wide measure of initiative and responsibility is left with the exchanges, reserved control is in the Commission if the exchanges do not meet their responsibility. It is hoped that the effect of the bill will be to give the well-managed exchanges that power necessary to enable them to effect themselves needed reforms and that the occasion for direct action by the Commission will not arise." H. R. REP. NO. 1383, 73d Cong., 2d Sess. 15 (1934).

In expressing his views as to the relationship of the Commission to the exchanges, Mr. Justice Douglas, when Chairman of the Commission, said:

> "My philosophy was and is that the national securities exchanges should be so organized as to be able to take on the job of policing their members so that it would be unnecessary for the Government to interfere with that business, and that they should demonstrate by action that they were so organized. Now, that is something more than cooperation. That is letting the exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." DOUGLAS, DEMOCRACY AND FINANCE 82 (1940).

More recently, Commissioner Cohen pointed out that "it is no accident that the federal securities laws have assigned to industry an important role in the development of appropriate standards of conduct. Subject to certain residual authority in the Commission, the national securities exchanges have a duty, under Sections 6 and 19 of the Securities Exchange Act, to provide rules and regulations concerning the operations of the exchange and its members." Address at Investment Bankers Ass'n of America Seminar, Oct. 25, 1962.

B. The Structure of the Act

Congress concluded that the most effective and desirable method for an exchange to control its members would be through the enforcement of its rules. As with the rules of the Commission, those adopted by exchanges and filed with and approved by the Commission are the keystone in the pattern of self-regulation established by Congress.

Section 5 of the Securities Exchange Act makes it unlawful to effect interstate transactions in securities through the facilities of an unregistered exchange. Section 6(a) specifies the conditions that an exchange must meet in order to register. In addition to filing all pertinent data with respect to its organization and existence, an exchange must agree to comply and to enforce compliance by its members with the Act, any amendments and any rule or regulation made thereunder. Section 6(b) requires that the rules of an exchange must include a provision for the expulsion, suspension or disciplining of members for conduct or proceeding inconsistent with just and equitable principles of trade. Section 6(c) authorizes an exchange to adopt and enforce rules that are consistent with the Act, the rules and regulations thereunder and the laws of the State where the exchange is located. Section 6(d) places the burden on the Commission to determine that the rules of an exchange are just and adequate to insure fair dealing and to protect investors and it is only after such a determination that an exchange may be registered.

Section 19(b) authorizes the Commission to make changes in the rules and practices of an exchange "for the

protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange" with respect to twelve specifically designated categories, including "the manner, method, and place of soliciting business; * * * the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange" and one general category entitled "similar matters."

When the Exchange applied for registration, it filed copies of its constitution and rules with the Commission which entered an order on September 28, 1934, finding that such rules were just and adequate to insure fair dealing and to protect investors. It was only then that the Commission approved the registration (R. 94).

C. The Rules Governing Private Wires

Among the rules filed with the Commission were those relating to the regulation by the Exchange of private wires between members and non-members. Article III, Section 6, of the constitution provides that the Exchange shall supervise all matters relating to the dissemination and use of quotations and of reports of prices on the Exchange and may approve or disapprove any application for wire connections between a member and non-member (R. 262). Rules 355 and 356 provide that no member shall maintain a wire connection with a non-member without prior consent of the Exchange and that the Exchange may require at any time the discontinuance of any means of communication which has a terminus in the office of a member firm (R. 262-63).

The private wire rules were adopted on May 9, 1900 and were continued substantially unchanged. The expressed objective was to prevent improper connections of every kind and description that might bring undesirable business onto the floor of the exchange to the detriment of investors. Congress was apprised of the rules and their objective in connection with one of the earlier bills introduced to regulate securities transactions. *Hearings before Senate Committee on Banking and Currency*, 63d Cong., 2d Sess. 547-48

(1914). The Commission was apprised of the rules when it registered the Exchange and found that the rules were just and adequate to insure fair dealing and protect investors.

D. The Obligation to Enforce Exchange Rules

The Exchange is required by Section 6(b) to have rules for the expulsion, suspension or disciplining of a member and is authorized by Section 6(c) to adopt other rules. It is required to enforce all of them. Its responsibilities under the Securities Exchange Act can be met in no other way. The Commission did not determine that the rules of the Exchange *might* be just and adequate to insure fair dealing and to protect investors but that they *would* be just and adequate when enforced. In *Baird* v. *Franklin,* 141 F. 2d 238, 244 (2d Cir. 1944), *cert. denied,* 323 U. S. 737 (1944), the Court stated:

> "There can be no doubt that § 6(b) places a duty upon the Stock Exchange to enforce the rules and regulations prescribed by that section. Any other construction would render the provision meaningless. * * * If all that § 6(b) meant was that every exchange should pass token regulations, incapable of enforcement except at the wish of the exchange itself, there would have been no purpose for its inclusion in the Act. * * * [That section imposed] the twofold duty upon an exchange of enacting certain rules and regulations and of seeing that they are enforced."

And there can be no doubt that Congress, in incorporating Section 6(c), provided for the adoption of rules that the exchanges had the duty to enforce. Congress imposed upon the exchanges the "responsibility for promulgating regulations pertaining to the administration of their ordinary affairs" (S. Rep. No. 792, 73d Cong., 2d Sess. 13 (1934)), not as a pastime but to be enforced. In testifying before the House Committee considering proposed amendments to the Securities Exchange Act, Commissioner Purcell stated that "it does not seem reasonable to assume that the Congress intended merely to provide for the filing of

copies of exchange rules and to provide for their alteration by the Commission without any assurance that they would be enforced." *Hearings Before House Committee on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. 1265 (1941). The same opinion was expressed by Commissioner Mathews before the Senate Committee considering the adoption of the Maloney Act when he stated:

> "The exchanges may adopt rules subject to the jurisdiction of the Commission. They have certain obligations in seeing that their rules are enforced." *Hearings Before Senate Committee on Banking and Currency*, 75th Cong., 3d Sess. 7 (1938).

In view of the foregoing, the conclusion of the majority of the Court of Appeals that "the Exchange is required by virtue of the statute to enforce its rules" (R. 264) seems inescapable. The United States and the Commission agree "that an exchange must not only enact but also enforce rules for the discipline of its members. The Act contemplates an extensive and effective degree of self-regulation by an exchange, including *inter alia* enforcement, not just adoption, of rules."[1]

E. The Enforcement of the Private Wire Rules in this Case

The Exchange's statutory responsibilities include the regulation of its members' business activities to promote high standards of conduct. Affirmative action is required not only for the protection of investors but to preserve the Exchange's reputation which, as the Court of Appeals stated, is "important to the national economy" (R. 265).

Implicit in the Exchange's rules governing its members' business activities is a standard designed to promote conduct consistent with just and equitable principles of trade. As the standard is based primarily on business

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[1] Brief for United States in support of petition for writ of certiorari, p. 9.

ethics, it cannot be set forth as part of a specific rule. This is apparent from *Avery* v. *Moffatt*, 187 Misc. 576, 592 (Sup. Ct. N. Y. Co. 1945), where the Court said:

> "Moreover, securities trading is a highly complex field in which it is not always feasible to define by statute or by administrative rules having the effect of law every practice which is inconsistent with the public interest or with the protection of investors. As a result there is a large area for the operation of exchange rules on the level of business ethics rather than law, and in that sphere the statute leaves it to the exchanges to carry on the necessary work of prevention and discipline."

The United States recognizes "that the Exchange in this instance was applying a standard of integrity and reliability. The termination of members' wire connections with brokers and dealers who lack integrity and reliability is certainly conducive to the promotion of member conduct consistent with just and equitable principles of trade" (Br. 45). The Exchange concluded, after an extensive investigation, that the Silvers were sufficiently lacking in integrity and reliability that the temporary approval of the private wires should be withdrawn.

Plaintiffs' principal contention is that the Exchange was powerless to act in this case because plaintiffs are non-members. It is apparent, however, that if the Exchange is to meet its statutory responsibilities in regulating the conduct of its members, it must consider all their activities in the securities field—with other members, the investing public, corporations issuing securities, and all others with whom they transact business, including non-members. The United States agrees that "the broad regulatory responsibilities of an exchange require it to police its members' business dealings both on and off the exchange, in listed as well as in unlisted securities. * * * The statutory injunction that exchange rules must insure 'fair dealing' and 'protect investors' (Sec. 6(d)) reflects a congressional intention that the exchanges should regulate all conduct by

their members which may adversely affect the interests of investors, even though such members may not be directly or consciously responsible for any wrongdoing" (Br. 44).

Equally lacking in merit is plaintiffs' argument that Municipal, Inc. "utilized these private wire connections primarily to obtain quotations and transact business in over-the-counter securities" (Br. 5-6). Plaintiffs ignore the express representations made by Municipal, Inc. in its application for Exchange approval (R. 47-50) as well as the allegations of the complaint that Municipal, Inc. applied for and used the private wires to obtain quotations of, and effect transactions in, listed securities (R. 3).

In any event, the actual use made of private wires is irrelevant to the responsibilities of the Exchange in regulating its members. As the majority of the Court of Appeals stated:

> "The Exchange must have sufficient power of discipline over its members to enable it to enforce the high standards of conduct which the Act contemplates. If it is to have the requisite power it cannot be hamstrung by an unjustifiable limitation based upon whether its members are at the moment dealing in listed or in unlisted securities" (R. 266).

With this ruling, the United States and the Commission are also in agreement. They recognize that "an exchange, in regulating the conduct of its members, must consider all of their securities transactions, not just their trading in listed securities on the exchange."[2]

Finally, the standing and reputation of the Exchange could not be preserved or enhanced by confining control over members in only one area of their business activities. Maintaining its reputation and the confidence of investors is one of the Exchange's most important objectives. The

[2] Brief for United States in support of petition for writ of certiorari, pp. 8-9.

Court of Appeals recognized the value of the Exchange's reputation in stating:

> "It is highly important for the proper operation of the Exchange as a public institution that its membership and procedures continue to enjoy the confidence of investors. The reputation of the Exchange is a valuable asset from the public point of view" (R. 266).

Congress did not intend, and the Commission would not permit, the Exchange to relax its efforts to maintain its reputation at the highest level. Constant vigilance and prompt and decisive action are imperative. It cannot and should not be otherwise.

II

The Exchange should not be subject to the Sherman Act for actions taken pursuant to its responsibilities under the Securities Exchange Act.

The substance of the United States' argument is that although the Exchange exercises "regulatory functions which ordinarily are exercised only by the government itself" (Br. 34-35), it is a private association and therefore should not be granted an immunity similar to that of a government official (Br. 35, 49). Inherent in this argument is the failure to recognize that although the Exchange has attributes of both a government agency and a private association, it cannot act in both capacities at the same time. We submit that the only logical and consistent test in determining the issue of immunity is whether the Exchange is acting in its governmental capacity, in which its activities and responsibilities are comparable to those of the Commission, or in a private capacity unrelated to any regulatory obligations. When fulfilling its regulatory responsibilities under the Securities Exchange Act, the Exchange should no more be subject to the antitrust laws than is the Commission.

An additional and related error is the assumption that immunity can be granted only on the grounds of repugnancy between the Sherman and Securities Exchange Acts (Br. 23). Once it is recognized that immunity is required because of the governmental character of the Exchange's action, it becomes unnecessary to consider the issue of repugnancy. Immunity of a government official is predicated on the need to encourage effective administration of governmental policies and not because of a repugnancy between any laws. In any event, there is a clear repugnancy between the Sherman and Securities Exchange Acts which affords a second and separate ground for immunity.

Finally, the Commission has not only the authority to review the action of the Exchange but the responsibility of making a final decision on this matter subject to judicial review under Section 25(a) of the Securities Exchange Act. Court review of the enforcement of the Exchange's rules in an antitrust action would preclude Commission review of matters entrusted to it by Congress and on which it is eminently qualified to exercise its judgment.

A. The Exchange's Statutory Responsibilities

We have shown, and the United States agrees, that the Exchange's action in this case "was within the general area of its responsibilities under the Securities Exchange Act" (Br. 43). In meeting its responsibilities, the Exchange is performing functions comparable to those of the Commission. In fact, the Exchange's responsibilities are in some respects even greater. The Exchange has the primary obligation of regulating its members with the objective of protecting the investing public. Under the concept of self-regulation, the Commission's obligation is secondary; it is authorized to act in this area only if the Exchange fails to meet its obligations.

Neither the Exchange nor anyone else could be expected to discharge statutory obligations effectively under the constant threat of severe penalties. Absent any immunity,

the more effectively the Exchange regulates the conduct of its members, the greater the penalties that may be imposed under the antitrust laws. The United States was stating the obvious in acknowledging that "an exchange and its members may be reluctant to act vigorously in disciplining erring members if they are subject to possible antitrust liability should it ultimately turn out that they went beyond the bounds of permissible regulatory action in the particular case" (Br. 34).

It is for the same reason that government officials have long been held immune from civil liability for acts performed in the course of their official duties. *Spalding* v. *Vilas*, 161 U. S. 483 (1896). The privilege has been applied to commissioners of the Securities and Exchange Commission, *Jones* v. *Kennedy*, 121 F. 2d 40 (D. C. Cir. 1941), *cert. denied*, 314 U. S. 665 (1941), and is not even destroyed by allegations of malice. *Barr* v. *Matteo*, 360 U. S. 564 (1959). The basis of the rule is that governmental policies would be thwarted if a government official was deterred in the performance of his duties by threat of damage suits. It is not based on any other principle applicable only to government officials such as sovereign immunity. See 3 Davis, Administrative Law, pp. 506-44 (1958). The objective of the rule was stated in *Barr* v. *Matteo*, *supra*, as follows:

> "The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." (360 U. S. at 571.)

There has been no occasion to apply this rule to a private organization because, with the exception of the Securities Exchange Act, Congress has rarely delegated governmental powers to a private group. But the reasons for applying the rule to the Exchange are even more com-

pelling than in the case of a government official. If subject to the antitrust laws, the Exchange must face the spectre of treble damages (in this case allegedly $3,000,000), costs, attorney's fees, fines and imprisonment—hardly an appropriate reward for "performing a vital public function" (R. 265).

When confronted with a situation which may call for the exercise of disciplinary or other regulatory powers, how could the Exchange be expected to make an objective appraisal if required to act at its peril and face the threat of such penalties? A detached evaluation with the protection of investors as the paramount objective would be replaced by a consideration of the antitrust consequences. And since almost all Exchange activities require concerted action on the part of its members, they might be considered to be within the purview of Section 1 of the Sherman Act. The Exchange would be confronted with an almost insurmountable obstacle in meeting its responsibilities. A serious threat to the continued effectiveness of the self-regulatory scheme envisioned by Congress and acknowledged to have been outstandingly successful would be presented. When viewed in this light, it is clear that Congress could not conceivably have intended the antitrust laws would apply to the Exchange when meeting its statutory responsibilities. To hold that they do would, in our view, be tantamount to destruction of a carefully thought-out and implemented regulatory pattern.

B. The Repugnancy Between the Sherman and Securities Exchange Acts

The Sherman Act requires each business entity to exercise its own independent judgment in deciding whether to deal with others. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). The Securities Exchange Act, however, requires that the decision be made not by each member firm but by the Exchange whenever necessary to maintain high ethical standards and promote conduct consistent with just and equitable principles of trade.

Furthermore, the Exchange, as an unincorporated association, can function only through its members. Not a single regulatory rule of the Exchange can be implemented without joint action, or inaction, on the part of its members. Any action required by its rules, having an adverse effect upon a non-member, might technically be considered to be the product of a combination or agreement. The Commission's views on this unique situation were expressed in its brief *amicus curiae* in the Court of Appeals as follows:

> "But inherent in the concept of an organization consisting of members whom it is required to discipline—which is precisely what an exchange registered under the Securities Exchange Act is—there is the possibility that otherwise appropriate and necessary disciplinary action may unavoidably have an inherent adverse effect on a non-member. To say that such an effect may violate the anti-trust laws would seriously impair and *pro tanto* negate the basic concept established by the Securities Exchange Act, namely, self-disciplining exchanges organized on a membership basis." (pp. 11-12.)

It is impossible to believe that Congress intended enforcement by the Exchange of one of its rules—whether adopted by the Exchange and approved by the Commission or written by the Commission itself under Section 19(b)—could result in a violation of the antitrust laws. Stated differently, "it would be absurd to punish under one federal law action taken pursuant to another." 111 U. of Pa. L. Rev. 236, 238 (1962).

C. Review of Exchange Decisions by the Commission

The United States' principal concern with the Court of Appeals' decision is that the Securities Exchange Act does not provide a "method for correcting arbitrary disciplinary action by an exchange" (Br. 41). The Commission has ample authority to correct such action under Section 19(b) or Section 23(a) and its determination would be subject to judicial review under Section 25(a).

Section 19(b) of the Securities Exchange Act authorizes the Commission to require that an exchange make "speci-

fied changes in its rules and practices" which are "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange." Unless such changes are made, the Commission is empowered to "alter or supplement the rules of such exchange" relating to such matters as "the manner, method, and place of soliciting business; * * * the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange * * * [and] similar matters." In discussing this section, plaintiffs significantly avoid any reference to the terms "soliciting business" and "similar matters" (Br. 12, 28-29). We submit that in the context of Section 19(b), the private wire rules are included in the phrase "similar matters," since they were used by members for "soliciting business" and were obtained by Municipal, Inc. for the express purpose of, and in fact used for, obtaining quotations of "transactions on the Exchange." As the Commission pointed out in *Matter of the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 293 (1941), "under the rules of law governing construction of statutes Section 19(b) should be construed broadly to accomplish its purposes."

The effect of the District Court's order is to amend the private wire rules. To enjoin the Exchange from enforcing a rule except under limited conditions is, as a practical matter, the same as amending that rule. The proposed conditions which the United States seeks to impose in the enforcement of the private wire rules are, in effect, the same as supplementing those rules. Whether viewed as an amendment of, or a supplement to, the rules, Congress delegated to the Commission and not to the courts the authority to make such changes.

In addition to its authority to make changes in the "rules and practices" of the Exchange under Section 19(b), the Commission is authorized by Section 23(a) "to make such rules and regulations as may be necessary for the execution of the functions vested" in it by the Act. The effect of

Section 23(a) is discussed in Comment, *Stock Exchange Regulation of Nonmember Brokers*. 71 YALE L. J. 748, 758 (1962), as follows:

> "Since one of the SEC's functions is to insure the fair administration of an exchange's activities, promulgation of a hearings rule to be complied with by the exchanges would be proper. And, if an exchange failed to adhere to the SEC rule by denying a hearing to over-the-counter dealers in disciplinary proceedings, the SEC is authorized by statute to suspend or revoke the exchange's registration. Moreover, if a provision is included in the SEC rule allowing for an appeal to the SEC by nonmember dealers who have been denied a hearing, still another objective of the 1938 amendment can be incorporated into the field of exchange regulation."

The only remaining question is whether, because of the antitrust issues, the Commission is to be denied the right to exercise the duties entrusted to it by Congress despite its "intimate familiarity with the characteristic features of the [securities] industry." *United States* v. *Morgan*, 118 F. Supp. 621, 699 (S. D. N. Y. 1953). The broad and pervasive scope of the Securities Exchange Act is apparent from the Commission's decision in *Matter of the Rules of the New York Stock Exchange*, 10 S. E. C. 270, 293 (1941), where it said:

> "Section 2 recites that transactions in securities as conducted upon national securities exchanges are affected with a national public interest, which makes it necessary to provide for regulation and control of such transactions and 'of practices and matters related thereto,' and 'to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce . . . and to insure the maintenance of fair and honest markets in such transactions.' It should be noted that the regulation contemplated by the Act was to be 'reasonably complete and effective'; that it was to cover not only national securities exchanges but also 'the practices and matters related thereto'; that interstate

commerce was to be protected, and that fair markets in securities transactions were to be maintained."

Control by the Commission "of practices and matters related" to "transactions in securities" could not be "reasonably complete and effective" if the presence of antitrust issues required that control be transferred to the courts. Moreover, Commissioner Mathews' testimony at the Maloney Act hearings indicates that Congress intended the Commission would resolve all issues relating to practices of exchanges, including antitrust issues. He stated:

"The Securities Exchange Act, to my mind, represents an attempt to bring those monopolistic practices [of exchanges] under Government control, to see that the acts and practices of the exchanges are carried out in the public interest. Some people have likened the proper sphere of the exchanges to that of a public-service corporation, in which the monopolistic element may properly be recognized but in which the need of regulation goes hand in hand with the grant of monopolistic privileges." *Hearings before Senate Committee on Banking and Currency*, 75th Cong., 3d Sess. 7 (1938).

Pursuant to its Congressional mandate, the Commission has, on prior occasions, resolved the conflicting objectives of the securities laws and antitrust laws. In *Matter of the Rules of the New York Stock Exchange*, 10 S. E. C. 270, 287 (1941), the Commission pointed out that one of the basic purposes of regulation under the Securities Exchange Act "is closely related to the public policy regarding unreasonable restraints and the maintenance of fair competition as declared by Congress in the Sherman Act, the Clayton Act and the Federal Trade Commission Act." Similarly, in *Matter of National Ass'n of Securities Dealers, Inc.*, 19 S. E. C. 424, 436 (1945), the Commission said:

"Thus the application of the Sherman Act has been properly raised as a problem to be considered in the course of our special administrative functions under the Securities Exchange Act."

Where, as here, the matter relates solely to practices of a registered exchange, it lies within the purview of the Commission and "Congress must have intended to give it authority that was ample to deal with the evil at hand." *Pan American World Airways* v. *United States*, 31 U. S. L. Week 4124 (Jan. 14, 1963).

Also relevant to this issue are the Commission's views as to the appropriate tribunal to decide this case. The United States acknowledges that the Commission would ordinarily entertain a complaint filed "by a person adversely affected by a rule of an exchange" (Br. 17, ftn. 11). If plaintiffs were adversely affected by the private wire rule as enforced, their remedy was to obtain review by the Commission. The United States' brief also states (46-47):

> "The Commission is aware of its responsibility in the administration of the securities laws to achieve a reasonable accommodation or balance between the salutary purposes of those laws and the antitrust laws, and it points out that the supervision of self-regulatory activities does involve weighing of alternatives and of perhaps conflicting objectives in the context of particular practices and problems. The Commission believes that as a matter of governmental policy the Commission, the agency designated by Congress to supervise the securities industry, including the exchanges, in the public interest, is the logical agency to make determinations in this area—especially because the interjection of antitrust procedures and doctrines at the behest of private litigants or indeed of other agencies of government could seriously impair the ability of the Commission, as an independent agency, to exercise its supervisory functions under the Act."

If an administrative agency's "disinclination to assume jurisdiction * * * is entitled to some weight," (*Pan American World Airways* v. *United States*, *supra*, dissenting opinion), conversely, the Commission's position on accepting jurisdiction in this case to avoid impairing its

ability to exercise its supervisory functions is entitled to at least equal weight.

III

The immunity of the Exchange from the Sherman Act should be determined on the basis of its statutory responsibilities and not be made dependent upon the reasonableness of its action.

The United States' commendable effort to reconcile the conflicting policies of the Sherman and Securities Exchange Acts raises, in our view, more problems than it would resolve. In acknowledging that an immunity from the anti-trust laws is required if the Exchange is to continue to meet its statutory obligations, the United States proposes that such immunity be conditioned upon the reasonableness of the Exchange's action, *i.e.*, that it follow a reasonable procedure and arrive at a reasonable decision (Br. 50-52).

We have shown, and the United States agrees, that the Exchange could not be expected to discharge its statutory obligations with the prospect of treble damages, costs, fines and imprisonment as its only reward. Obviously, it would be no less reluctant to meet those obligations if exoneration were dependent upon convincing a court that it did not exceed the bounds of what is considered, with the benefit of hindsight, to be reasonable action. There are many situations in which one person would believe there is a need for affirmative action, another person would be somewhat doubtful and a third would believe that no action was warranted. Moreover, what appears to the Exchange as reasonable may seem unreasonable to someone unfamiliar with the daily problems confronting the Exchange in the specialized field of securities trading, the methods available for meeting those problems, and the effectiveness of those methods.

Related to the issue of the extent of any immunity is the United States' contention that the conflicting statutory policies should be reconciled on a case-by-case basis (Br.

16-17). We submit, however, that the Exchange would be severely handicapped in meeting its statutory obligations if required to assume the burden of predicting—with sufficient certainty to justify the risk of the civil and criminal sanctions of the antitrust laws—that a court would agree it had acted reasonably in every one of the countless situations that arise almost daily throughout the year. To apply such a test would, as the Court of Appeals stated, "go far toward defeating the statutory policy of self-regulation" (R. 266).

The inability of courts to agree on whether conduct is reasonable or arbitrary is apparent from numerous decisions. For example, in *Matter of Marburg* v. *Cole*, 175 Misc. 308, 314 (Sup. Ct. Albany Co. 1940), the Court held that the refusal of the New York Commissioner of Education and Board of Regents to approve an application for a medical license was "arbitrary and unreasonable." The Appellate Division affirmed, but a dissenting judge stated that "we may not say that the educational authorities of the State have acted unfairly, arbitrarily or capriciously in passing on respondent's application." 261 App. Div. 324, 338 (3d Dep't 1941). The Court of Appeals reversed in a five-to-two decision, the majority holding that the refusal was not "arbitrary, unfair or capricious" (286 N. Y. 202, 211), the dissent stating that the "defendants went far outside the bounds of their broad discretion in denying his application" (p. 215). See also, *e.g.*, *O'Beirne* v. *Overholser*, 193 F. Supp. 652 (D. D. C. 1961), *rev'd*, 302 F.2d 852 (D. C. Cir. 1961); *Matter of Gambino* v. *State Liquor Authority*, 7 Misc. 2d 983 (Sup. Ct. N. Y. Co. 1956), *rev'd*, 4 App. Div. 2d 37 (1st Dep't 1957), *aff'd*, 4 N. Y. 2d 997 (1958); *Matter of Marks* v. *Regents of University of N. Y.*, 203 Misc. 837 (Sup. Ct. Albany Co. 1951), *rev'd*, 279 App. Div. 476 (3d Dep't 1952), *aff'd*, 306 N. Y. 591 (1953); *Matter of Rochester Gas & Electric Corp.* v. *Maltbie*, 172 Misc. 359 (Sup. Ct. Albany Co. 1939), *rev'd*, 258 App. Div. 682 (3d Dep't 1940), *aff'd*, 284 N. Y. 626 (1940).

The test which should be applied is whether the Exchange acted in good faith and within the scope of its statutory authority. Unlike a standard of reasonableness, a test

of good faith would not deter the Exchange in the diligent performance of its statutory obligations and, at the same time, would be sufficient to deter the Exchange from misuse of its regulatory powers, which appears to be the primary concern of the United States (Br. 32).[3] The record will be searched in vain for any indication that the Exchange did not act in good faith.

The difficulty in predicating immunity upon "reasonableness" becomes even more evident after analysis of the United States' proposal. The procedural prerequisites are acknowledged to "depend upon the circumstances" (Br. 50). But "if a standard can be no more specific than 'all the circumstances,' there is no way of anticipating what the standard may be."[4]

The requirement that "a thorough inquiry" be conducted is, on its face, eminently reasonable but may be as deceptive as the other proposed criteria. For example, in this case the Exchange had an investigation made by several independent investigating agencies which it had used for many years and had found to be reliable and well qualified (R. 97). That more than seven months were required to complete the investigation (R. 47, 63) indicates its thoroughness. Even after Silver submitted letters of recommendation to the Exchange, three additional reports were obtained which confirmed the prior reports (R. 194). In spite of this, the United States arrives at the incredible conclusion that "the thoroughness of such investigation seems open to question" (Br. 53-54). This conclusion is based upon an equally incredible ground, *i.e.*, that "with

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[3] This is not a case where a non-member "of the highest qualifications is denied access to * * * facilities as a result of a conspiracy designed to restrain competition and deprive him of his [business] in order to benefit competing members of the conspiracy." *Willis* v. *Santa Ana Community Hospital Ass'n*, 26 Cal. Rptr. 640, 642 (Cal. 1962). Nor is it a case where the private wires were discontinued for reasons "patently arbitrary or discriminatory" *e.g.*, that the applicant "was a Democrat or a Methodist." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 898 (1961).

[4] Westwood & Howard, *Self-Government in the Securities Business*, 17 LAW & CONTEMP. PROB. 518, 542 (1942).

respect to one of the four grounds upon which the Exchange based its action—the charge that Silver had made a misstatement in connection with the acquisition of certain stock * * * the district court found (R. 230) that had the Exchange first checked with the Securities and Exchange Commission, it would have discovered that Silver had submitted a statement to the Commission which exculpated him" (Br. 54). Not only is this an excellent example of hindsight, but the Exchange had no reason to suspect that the matter had even been considered by the Commission. If the failure to pursue one remote possibility renders the thoroughness of the entire investigation "open to question," only "the most resolute, or the most irresponsible"[5] would take affirmative action.

Furthermore, the Commission did not "exculpate" the Silvers. On the contrary, in the Commission's letter to the Silvers it noted that they had discontinued the sales of such stock "as a result of the inquiry into this matter by [the Commission]" (Pltfs' Ex. 64, Certified Record 585). The Commission also stated that its letter "does not constitute a ruling by the Commission and will not serve to relieve you of possible civil liability under applicable legislation" (*id.* at 587). The discontinuance of sales of securities as a result of a Commission investigation warrants at least a permissible inference that such sales were improper. An inquiry by the Exchange, would have served no purpose other than to confirm the Exchange's decision.

The proposal that the Exchange disclose the reasons for its decision and afford the non-member an opportunity to answer, although not objectionable, is inapplicable to this case. Municipal, Inc. expressly agreed that "the said wire or other connections and the furnishing of said quotations to us shall be discontinued whenever [the Exchange] shall withdraw approval thereof" (R. 49) and not only after a hearing and disclosure of the Exchange's reasons. In ac-

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[5] *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U. S. 949 (1950).

cepting this condition, Silver waived any rights he may have had to a hearing or a disclosure of the reasons. In any event, the issue of the Exchange's liability under the Sherman Act should not turn on whatever procedural rights plaintiffs may have had.

The remaining proposed condition which the United States contends the Exchange should meet, but did not in this case, is that it have reasonable grounds for concluding that the non-member lacked integrity and reliability (Br. 51, 54). First, the ground that Silver had breached an agreement relating to the acquisition of certain shares of stock certainly bears on his integrity and reliability as a securities dealer. As previously stated, Silver had made substantial sales of such securities within two months after he agreed he had no present intention of selling them and discontinued doing so only after an investigation had been made by the Commission.

Second, but no less important, is the suspension of the security clearance of the Silvers and a corporation of which they were officers, directors and substantial stockholders, and their repeated, but unsuccessful, efforts to have the suspension vacated (R. 97). The District Court's conclusion that "the Exchange chose to rely upon the naked fact that the security clearances had been suspended without any information as to the nature of the charges which had been made against the Silvers" (R. 231) has no record support. The District Court's conclusion apparently resulted from the Exchange's statement in its affidavit on the motion for summary judgment of the reasons for the security clearance suspension which had been admitted by Silver on his deposition (R. 97-98) and as to which there could be no question. The documents produced by Silver (R. 107-10) were submitted by the Exchange to the District Court for the additional purpose of refuting Silver's contention that he did not know why his security clearance had been suspended (R. 97). But this cannot justify as an "inescapable conclusion"

(R. 233) that the Exchange did not know at least some of those reasons at the time the private wires were discontinued.

Moreover, implicit in the suspension of security clearance is that it had once been granted, that all formal requisites had been met, and that it was revoked for a sound reason. Even assuming, contrary to the fact, that the Exchange did not know any of the reasons for the suspension, there is no warrant for branding as arbitrary the inference that the suspension was for reasons impugning the person's integrity and reliability. The error in so doing is apparent from the admitted grounds on which the suspension was based, *i.e.*, that the Silvers "intentionally and without authorization disclosed classified security information," that they had "willfully disregarded security regulations," that their "behavior, activities and associations tend to show that [they] are not reliable and trustworthy," and that they had "deliberately falsified facts and omitted to reveal certain material facts * * * to official representatives of the U. S. Navy and U. S. Air Force" (R. 97-98).

If reasonableness is the standard to be applied, the question is not whether any member of this Court agrees with the Exchange's conclusion but whether the Court recognizes that a reasonable man might reach the same conclusion. Furthermore, the reasonable man in question is an organization charged by statute with the primary obligation of regulating the conduct of its members for the protection of the investing public. A second consideration is that the Exchange knows it may be liable for any damages which could have been avoided had affirmative action been taken. A further consideration is the Exchange's realization that if it does not act promptly and effectively, the Commission stands ready to act in its place and, in doing so, would weaken a concept which Congress believes to be the most effective and desirable for investors—the concept of self-regulation. When viewed in this context, the decision of the Exchange should not be considered to be "without adequate determining principle or * * * unreasoned."

as this Court defined "arbitrary" in *United States* v. *Carmack*, 329 U. S. 230, 243 (1946).

As a final argument that the Exchange did not have sufficient grounds for its decision, the United States argues that the Exchange merely discontinued the private wires but "did not forbid its members from all dealings with petitioners" and therefore "cannot claim that its action against petitioners was designed to protect its members from *dealing* with people who were themselves likely to engage in improper securities transactions" (Br. 57). The simple and obvious answer to this contention is that the Exchange can function, as Congress contemplated and the Commission requires, only in accordance with its rules. It took the most effective action contemplated by its rules under the circumstances presented in this case.

IV

The action of the Exchange, if not immune from the Sherman Act, should be judged only after a full inquiry afforded by a trial.

We have established that the Exchange is immune from the antitrust laws when acting pursuant to its responsibilities under the Securities Exchange Act. Even assuming that it is not, the facts in this case do not warrant the application of the *per se* rule without a full inquiry into the necessity for the Exchange's decision in carrying out its responsibilities. The extensive regulation of the Exchange and its statutory obligations to enforce its rules require that its action be judged only at a trial.

We are not here dealing with independent business entities that embark on programs of concerted action for the purpose of restraining trade or gaining competitive advantages as in *Radiant Burners* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); and *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457 (1941). The Exchange's sole objective was to perform conscientiously the important duties imposed upon it by the Securi-

ties Exchange Act. Furthermore, the private wire arrangement was for the mutual benefit of plaintiffs and the member firms. After the discontinuance of the private wires, the member firms shared the loss of whatever benefits may have resulted from such arrangement.

The United States acknowledges that "to some degree self-regulation may be weakened by the application of concepts of *per se* liability under the antitrust laws which were evolved for the purpose of suppressing anti-competitive combinations without inquiry into alleged justifications therefor in particular cases" (Br. 33). That the principle of self-regulation may be weakened to any degree is alone sufficient reason for rejecting the *per se* rule in this case. The conflicting policies of the Sherman and Securities Exchange Acts cannot be effectively resolved by automatic condemnation of any restraint resulting from action taken under the latter. The policies of the Securities Exchange Act are entitled to at least equal consideration. To hold otherwise would mean that any restraint of trade must be condemned even if the ultimate loss falls on the investing public.

Whether the *per se* rule should be applied cannot be determined on the record here made. There has been no "inquiry * * * into the character and background of the industry involved." *United States* v. *Morgan*, 118 F. Supp. 621, 635 (S. D. N. Y. 1953). The solution of antitrust problems "depends in the last analysis upon an intimate familiarity with the characteristic features of the particular industry in which these problems arise" (*id.* at 699).

The extent of the inquiry required—and which was not permitted here—was stated by Mr. Justice Brandeis in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918), as follows:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such

as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The mere statement of the nature of the inquiry is sufficient to show that it can be made only at a trial.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

A. Donald MacKinnon
1 Chase Manhattan Plaza
New York 5, New York
Attorney for Respondent

Samuel L. Rosenberry
Edward J. Reilly, Jr.
Squire N. Bozorth
Of Counsel

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APPENDIX

Section 23(a) of the Securities Exchange Act of 1934:

The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this title, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

Section 25(a) of the Securities Exchange Act of 1934:

Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith transmitted by the clerk of the court to any member of the Commission, and thereupon the Commission shall file in the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record shall be exclusive, to affirm, modify, and enforce or set aside such order, in whole

or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).